



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**ELRC NO. 1523 OF 2010**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,  
HOSPITALS AND ALLIED WORKERS.....CLAIMANT

VERSUS

MARY NJOKI MUREITHI.....1<sup>ST</sup> RESPONDENT

BEATRICE WANJIKU CHOMBA.....2<sup>ND</sup> RESPONDENT

FLORA NJERI KIARIE(NATIONAL COLLEGES WITH PUBLICITY AS

UNIVERSAL CENTRAL ACADEMY.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The Claimant instituted this suit on 14<sup>th</sup> December 2010 vide the Memorandum of Claim dated 30<sup>th</sup> October 2010. The Claimant amended its Memorandum of Claim vide the Amended Memorandum of Claim dated 14<sup>th</sup> July 2015 and filed on 21<sup>st</sup> July 2015. The Claimant is suing the Respondents for wrongful termination of employment and seeks the following reliefs for the following grounds:-

NAME	ACTUAL PAID	LEGALLY PAID	DIFFERENCE AS PER THE CBA	RECOMMENDATION OF THE MINISTER	NOTICE KSHS.	RETIREMENT GRATUITY	TOTAL KSHS.
James Gitau 1973 Artisan Grade 111	3,958	7,895	3937 x 12 x 5 =KShs. 236,220.00	KShs. 15,316.00	KShs. 31,580.00	KShs. 157,900.00	KShs. 441,016.00
Tasira K. Muthurui Secretary 1976	6,746	10,741	3995 x 12 x 6 = KShs. 287,640.00	KShs. 86,690.00	KShs. 42,964.00	KShs. 375,935.00	KShs. 793,229.00
Philip Githinji 1982 Artisan Grade 1	6,746	10,741	3995 x 12 x 6 = KShs. 287,640.00	KShs. 86,690.00	KShs. 42,964.00	KShs. 375,935.00	KShs. 793,229.00

<b>Jane Wanjiku</b>	5,557	8,833	3276 x 12 x 6 =KShs.	KShs. 25,224.00	KShs.	KShs.	KShs.
<b>1984 Artisan</b>			235,872.00		35,332.00	211,992.00	508,420.00
<b>Grade 11</b>							
<b>Gabriel Mugwanja</b>	3,958	7,895	2937 x 12 x 6 = KShs. 211,464.00	KShs. 59,716.00	KShs.	KShs.	KShs.
<b>1973 Artisan</b>					31,580.00	276,325.00	579,085.00
<b>Grade 111</b>							
		<b>TOTAL</b>	<b>125883600</b>	<b>27313600</b>	<b>18442000</b>	<b>283081800</b>	<b>3017804</b>

**Table 1**

### **The Claimant's Case**

2. The grievants were employees of the National College with publicity as Universal Central Academy. The Claimant reported the existence of the trade dispute to the Minister for Labour and Human Resource Development under **Section 62 (1) of the Labour Relations Act 2007**. The Minister accepted the dispute and appointed Mr. Kamano of Thika Labour Office to act as Conciliator. Parties were issued with summons to attend a conciliation meeting and they complied.

3. On 26<sup>th</sup> August 2009, a meeting was held in the Conciliator's office whereby Augustine Kiarie Githae (deceased) informed the Conciliator that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were not present in the meeting. During the meeting, it was agreed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent should be incorporated in the payment of the terminal dues, which was to be paid within 30 days from the date of the meeting. However, the Directors failed to honour the decision.

### **The Respondents' Case**

4. It is the 1<sup>st</sup> Respondent's case that National College operated as private limited company and had 4 directors namely: Augustine Kiarie Githae, James Muchiri Chege, Christopher Kariuki Muriithi and Fowers Ndung'u Gatimu. James Muchiri resigned and ceased to be a director in 12<sup>th</sup> April 1966, Augustine Kiarie Githae left the management of the college to the 2 remaining directors in 1968. In 1970, Christopher Kariuki left the management of the college to Fowers Ndung'u who later passed on leaving behind the 3<sup>rd</sup> Respondent as his administrator.

5. The land where the school was structured was sold to a third party. Augustine Kiarie had no objections concerning the settlement of workers dues but felt that the burden should be shared equally by the three Directors.

6. From 1971 to 1987, the late Christopher did not tender his resignation letter to terminate ownership of the school and the 2<sup>nd</sup> Respondent did not equally terminate the same in her capacity as the administrator of the estate and remained a partner to the date of sale. From 1971 to 2008, the 3<sup>rd</sup> Respondent did not tender any letter of resignation in her capacity as the administrator of her husband's estate hence remained a partner until date of sale. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were dormant partners and this cannot be a reason to disown the plight of the workers.

7. It is the 1<sup>st</sup> Respondent's case that the balance of the sale proceeds should be used to pay all the arrears of the workers' terminal dues as claimed.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that the late Augustine Kiarie, the late Christopher Kariuki and the late Fowers Ndung'u owned all that parcel of land known as L.R. Number 4953/968. However, the National Colleges (University Central Academy) was an institution wholly owned, operated and run by the late Augustine Kiarie at the exclusion of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents but was on the suit premises. The 2<sup>nd</sup> Respondent had nothing to do with the National Colleges (University Central Academy), they were not part of its proprietorship, they were never involved in its running, were not the employers of the named employees and have never drawn any profits, salaries or losses from the same.

### **The evidence**

9. CW1, Philip Ndashi Nganga and a grievant in this case, testified that he used to work with National Colleges Thika as a technician from 1982 up to the time the school was sold. They were 8 workers: Teresia Keringa, Wainaina Kamau (deceased), Patrick Muturi (deceased), James Gitau, Jane Wanjiku, Gabriel Mugwanja and Paul Githinji. The matter was referred to the labour department but the Respondents never attended. The Labour officer wrote a letter recommending payment of the grievants' dues by the Respondents. He stated that each of the grievants was entitled to their own dues: CW1 was Kshs. 696,054.00, James's 441,016.00, Teresia's was 793,229.00, Wanjiku's was Kshs. 508,420.00, Gabriel's was Kshs. 579,085.00, Philip's was 696,054.00, Patrick's was Kshs. 270, 424.00 and Wainaina's was Kshs. 736,809.00.

10. Upon cross-examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, CW1 stated that he had been employed by the school but also admitted that he and the other grievants were not issued with appointment letters. He insisted that his salary would be remitted monthly but a pay slip was not issued. He admitted that inasmuch as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would come to the school, they had never instructed him and he didn't know what they usually came to do.

11. During cross-examination by Counsel for the 3<sup>rd</sup> Respondent, CW1 stated that he knew that there had been 3 partners. He also clarified that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents never came to the conciliation meeting. Further, he stated that the calculations were done according to the work done.

12. During re-examination, CW1 asserted that the calculations had been done at the labour office.

13. RW1, Beatrice Wanjiku Kitonga and the 2<sup>nd</sup> Respondent in this case, wished to rely on her witness statement as her evidence. She confirmed that she knew Augustine Kiarie Githae (deceased) and Fowers Ndugu Githingi (deceased) who had been her husband. She stated that they had jointly owned their land in Thika Municipality and not any business.

14. After 1971, Augustine used to run a school in the plot in Thika. She denied ever going for a meeting in the school, being involved in employing of the school staff or getting any money or profit from the school. She stated that in 2008, Augustine approached her to sign a document that would lead to the sale of the land in question which she refused. She averred that they had to sell the land afresh without the school staff and she got her share from the sale. She was not told anything about payment of workers fees. She urged the Court to find that Augustine and his family were responsible for the payment of claims.

15. During cross-examination by Counsel for the Claimant, RW1 stressed on the fact that the business had been for Augustine alone. She had never discussed anything with him concerning the business or the witness statement of Kiarie. She was of the view that she was not liable to pay the claims as prayed since she was never involved in the business.

16. Upon cross examination by Counsel for the 3<sup>rd</sup> Respondent, she reiterated that she was never told about the business and that the letters dated 23<sup>rd</sup> May 2008 and 7<sup>th</sup> January 2009 were never shown to her. She denied knowing anything about another case involving the land and stated that she didn't know much. She admitted to not going to the labour office.

17. RW2, Mary Karuku Mureithi and the 1<sup>st</sup> Respondent in this case, stated that she wished to rely on her witness statement as her evidence. She testified that Augustine Kariuki (deceased) and Fowers Ndugu (deceased) were known to her. She denied having knowledge of the fact that her husband Christopher Karuku Mureithi (deceased) owned land and that there was business going on in that land. She stated that Augustine had informed her that some land in Thika was being sold and she informed him that she did not know anything. It is RW1 who confirmed to her that land was to be sold and indeed it was sold. She denied there being a discussion concerning any workers. She was of the view that if there was a claim by the workers then Augustine was the one to pay.

18. During cross-examination by the Claimant's Counsel, she stated that she had never gone to see the land that was sold. Upon cross-examination by the 3<sup>rd</sup> Respondent's Counsel, she refuted claims that there was another case in Court about division of the proceeds from the sale of land and stated that there was a balance of money not paid for the land.

19. RW3, Paul Gatheya Kiarie, stated that he wished to rely on his documents as his defence. He acknowledged Augustine Kiarie (deceased) as his father. He indicated that the estate was ready to have the workers paid and wanted all the Respondents to bear the costs.

20. Upon cross examination by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Counsel, RW3 stated that the business was owned by three people but did not have the evidence to buttress that assertion. Further, he confirmed that the business name had been registered in the name of Augustine Githae.

21. During re-examination, RW3 stated that there were documents to show who was running the business. He stated that the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had a meeting where they decided on the college and how it was to be run.

### **The Claimant's Submissions**

22. The Claimant in its submissions dated 31<sup>st</sup> October 2018 and filed on 8<sup>th</sup> November 2018, submitted that the Respondents were the management of Universal Central Academy. They signed the Agreement for Sale of the suit property and the proceeds from the sale limited (sic) on 11<sup>th</sup> November 2008. The parties shared the legal costs. The workers terminal benefits were to be paid by the Respondents.

### **The Submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

23. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions dated 16<sup>th</sup> November 2018 and filed in Court on even date, submitted that the

Claimants are claiming special damages for a specified claim of KShs. 3,017,804.00 yet the Claimant has not proved the special damages on a balance of probabilities. The Respondents relied on the case of Sylas Odhiambo Nandi v Coastal Bottlers Limited [2016] eKLR where Justice O.N Makau ruled in favour of the Respondent stating that:-

**“After careful consideration of the material presented to the Court, I find that the Claimant has failed to prove on a balance of probability that he continued working for the Respondent after 30.9.2008. He did not call any witness to testify in his support and also never produced relevant documentary evidence to that effect. Having not denied that his wages were paid through the bank and that he was a member of the NSSF, the claimant should have produced at least statements for his bank account and NSSF as evidence of his continued employment. Instead he made general allegation that he used to sign manual Attendance Register and accused the employer for failure to produce the same as evidence ... Consequently I find that the claimant has not proved on balance of probability that he worked up to 30.9.2011.”**

24. The Respondents also relied on the case of Kenya Hotels and Allied Workers Union v Sovereign Hotel Limited [2018] eKLR, where the court found that pursuant to **Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya** and **section 57(1) of the Labour Relations Act 2007**, the Claimant had an obligation to prove its case on a balance of probabilities. The Respondents further relied on the case of Kennedy Maina Mirera vs. Barclays Bank of Kenya Ltd [2018] eKLR where it was held that according to section 47(5) of the Employment Act:-

**“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”**

25. The learned Judge in considering the evidence adduced found that the Claimant had failed to discharge the burden of proof placed on him under **Sections 107 and 108 of the Evidence**.

26. The Respondents also relied on the case of Jacob Bundi Marete & Another vs. Chairman and Council Members of Kenya Methodist University [2018] eKLR where the learned Judge stated:-

**“...The Claimants just threw documents to the court so to speak and anticipate the court will unravel what their particular claims are. It is not for the court to distil what the Claimants case is if the Claimants do make out a clear case.”**

27. I have examined all evidence and submissions of the Parties. This Court had occasion to decide on whether this Court will proceed with this case against all the 3 Respondents or only one of them. This Court went to great length in analyzing the submissions of the parties and in its ruling dated 29.6.2017 determined that all the 3 Respondents be jointly liable in this case because they had shared proceeds from the sale of the land upon which the National Colleges with Publicity As Universal Central Academy was being run and so had to share liability too.

28. I am convinced that having made a determination on this aspect, I cannot reverse it at all but will now go into the merits and quantum of any claim whatsoever. Based on the evidence of the grievants they worked for the college until it was closed but were never paid their terminal dues.

29. The grievants have submitted that they worked for the Respondent College. The grievants did not lead evidence in Court to explain how they arrived at the figures they seek as payment of their terminal dues as per the table 1 above.

30. The parties appeared before the Labour Officer where the Minister made recommendation on payments due to the grievants. To avoid miscarriage of justice, I will adopt the recommendation of the Minister as moneys payable to the grievants as follows:-

1. Wainaina Kamau = Kshs. 99,690/=

2. James Gitau = Kshs. 15,316/=

3. Patrick Muturi = Kshs. 39,764/=

4. Tasira Muthui = Kshs. 86,690/=

5. Philip Ndashi = Kshs. 86,190/=

6. Paul Githinji = Kshs.76,824/=

7. Jane Wanjiku = Kshs. 25,224/=

8. Gabriel Mugwanja = Kshs. 59,716/=

**TOTAL Kshs. 488,414/=**

9. Each party will bear their own costs.

Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

**In the presence of:**

Njeru for Claimants – Present

Respondents – Absent